UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1998/NGO/20
26 February 1998

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Fifty-fourth session
Item 8 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Written statement submitted by the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

Set of principles to combat impunity

1. The revised set of principles for the protection and promotion of human rights through the combating of impunity (E/CN.4/Sub.2/1997/20/Rev.1) submitted to the Commission on Human Rights by resolution 1997/28 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities is an important contribution to the promotion and defence of human rights, but suffers from shortcomings and omissions, some of which are pointed out below.

I. OMISSION OF PRINCIPLES CONCERNING IMPUNITY IN TRANSBOUNDARY OR EXTRATERRITORIAL VIOLATIONS OF HUMAN RIGHTS

2. The revised set of principles proposed in the Special Rapporteur's report totally omits the question of impunity for transboundary or extraterritorial human rights violations committed by a State or its agents in the territory of another State through armed aggression, infiltration of agents to commit assassinations or terrorist attacks, promotion of coups d'état, etc.

3. Such violations generally go unpunished. The same applies to the personnel of foreign armed forces stationed in third States who commit them: by virtue of what is delicately termed "status of forces", they enjoy extraterritoriality and are not accountable to the courts of the host country. This form of impunity was tragically highlighted by the recent disaster caused by a United States military aircraft in Italy.

4. The Committee on Human Rights has sensibly said, in interpreting article 2 of the International Covenant on Civil and Political Rights, that:

> "... it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory" (Communication No. 52/1979, Selected decisions relating to the Optional Protocol, CCPR/C/OP/1).

5. In this regard, the Special Rapporteur's report omits the question of impunity for human rights violations committed against various peoples during colonial and neo-colonial wars. The report also fails to deal with the question of impunity for human rights violations committed during operations authorized by the Security Council (international violations of human rights, for example, in Somalia or during the Gulf War). Consequently, the report does not address the topic of reparation (moral or material) for victims of transboundary or international violations of human rights.

6. For these reasons, the following principles should be added to those already contained in the report:

(a) The principles set out in the set of principles and the principle of States' liability for internationally unlawful acts apply in cases of extraterritorial or transboundary violations of human rights;

(b) The said principles are also applicable to human rights violations committed in the course of operations performed or authorized by the United Nations. Such violations entail the liability of the United Nations, the States involved, the persons who commit them and/or the persons who authorize them or fail to prevent their commission. The United Nations, the States involved and the other responsible parties have a joint obligation to compensate the victims and/or their successors in title, and the international community must ensure that the guilty parties are brought to justice;

(c) The principle of territoriality should apply to offences committed by an alien, i.e., the suspected culprit should, save only in the event of diplomatic immunity or of the establishment of a permanent international criminal court, be tried before the courts of the State where the offence was committed.

II. OTHER PRINCIPLES THAT HAVE BEEN OMITTED AND SHOULD BE ADDED

7. The judiciary must be independent and impartial. There should be no special or "ad hoc" courts. The independence of the judiciary from the executive should be stated and guaranteed in States' fundamental laws and

respected in practice. The conformity of sentences with the law implies the conformity of sentences with the fundamental rules of international law in the sphere of human rights. The independence and impartiality of the judiciary should also be guaranteed through the publicizing of trials and sentences. Neither judges nor advocates should be subject to pressure, threats or persecution.

8. The office of the public prosecutor should be independent from the executive.

9. Efforts should be made to universalize and improve international rules, instruments and machinery. That means that:

(a) All States should sign and ratify the human rights covenants, protocols and conventions and should recognize the competence to receive complaints of committees given that function in the covenants;

(b) The Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights should be supplemented by optional protocols establishing procedures for the lodging of complaints;

(c) The existing procedures within the United Nations system and regional systems must be improved so as to ensure effective protection for human rights.

III. COMMENTS ON THE PRINCIPLES PROPOSED IN THE REPORT

10. Principle 1: In this Principle, add "and every individual" after "Every State". The right to the truth should extend to the circumstances of all human rights violations, not just systematic or gross violations or heinous crimes. Accordingly, the relevant section of the Principle should read: "which led to the violations of human rights" and the expressions "systematic, gross violations" and "heinous crimes" should be deleted.

11. Principle 2: There is not only a duty, but also a right to remember. In addition to the rejection of revisionist arguments relating to objectively verified historical facts, it includes the right to the investigation and publicizing of facts concealed or distorted by the official version of history. The following text should be added to this Principle:

> "The right to remember shall also be guaranteed. It consists in the right to investigate and publicize facts that have been concealed or distorted."

12. Principle 4: In order to avoid giving the impression that the State has a monopoly on adopting appropriate measures or that such measures can only be adopted if the judicial system is deficient, the following wording is proposed:

> "As priority measures to give effect to the right to the truth, efforts should be made to establish extrajudicial commissions of inquiry and to secure the preservation of, and access to the relevant archives. Such measures are not only obligations for the State, but also a right of civil society."

13. Principles 5 to 12: While these principles attach great importance to extrajudicial commissions of inquiry, they overlook two fundamental points that would enable such bodies to act effectively:

(a) The obligation for the State to make available to a commission all the existing documentation;

(b) The possibility of using the police to bring witnesses before a commission and the legal obligation on witnesses to testify.

These two matters should be covered in the principles concerning commissions of inquiry. Subparagraph (a) of Principle 9, which provides that the appearance of witnesses shall be voluntary, should, therefore, be deleted. If appearance was voluntary, it is highly unlikely that anyone suspected of having committed violations would appear before a commission of inquiry.

14. Principle 11: This principle gives commissions the power of making recommendations, an activity that would exceed the competence of a commission of inquiry and is more suited to grassroots organizations, political parties or State organs. Principle 11 should be deleted.

15. Principle 14: Archives should be accessible not only to victims and their families, but also to their legal representatives.

16. Principle 18: The final sentence of Principle 18 should be replaced by the following: "Any person or institution with reliable knowledge of the facts may initiate the proceedings by means of a complaint." There is no legal basis whatsoever for requiring an NGO to prove long-standing activity on behalf of the victim. In the case of a class action or of the public right of action, what counts is not the plaintiff's "curriculum vitae", but the seriousness, accuracy and credibility of the complaint.

17. Principle 22: Principle 22 (extraterritorial jurisdiction in domestic law) can be read as authorizing a country's courts to try an alien for offences committed outside the country even if there is no treaty establishing universal competence and even if the victim or author are not nationals of the State to which the court claiming competence belongs. Similarly, the Principle can be read as authorizing a State to abduct someone in foreign territory in order to try them itself, an idea espoused by the United States Supreme Court in its decision 91-712 of 15 June 1992 (Alvarez Machain case). That decision was severely criticized in a legal opinion rendered by the Inter-American Juridical Committee at the request of the Permanent Council of the Organization of American States. The Inter-American Juridical Committee held, inter alia, that the United States Supreme Court's decision authorized violation of fundamental rules and principles of international law, including that of respect for States' territorial sovereignty (see Human Rights Law Journal, vol. 13, No. 9-10, 10 November 1992, pp. 395 et seq.). The American Association of Jurists has submitted the Alvarez Machain case to the Inter-American Commission on Human Rights (AAJ v. United States). Consequently, Principle 22 should be completely reworded and should merely

speak of the possibility for States, when victims or authors of human rights violations are its own nationals, of establishing exceptions to the principle of territoriality in the application of criminal law.

18. Principle 23: It is suggested that, for the reasons set out in the commentary to Principle 32, the final phrase, concerning the irremovability of judges, should be deleted.

19. Principle 32: The principle of the irremovability of judges is one of the hallmarks of a State governed by the rule of law. It is not, however, an absolute principle: judges can be removed for specific reasons and according to procedures laid down in the Constitution and law. An international declaration of principles should not seek - on the basis of a non-existent principle of parallelism of forms - to correct one instance of arbitrariness by another. Principle 32 should, therefore, be deleted.

20. Principle 34: The obligation of reparation should be a joint obligation of the State and the direct author or authors of, and accomplices in or accessories to the violations and the right to seek reparation should be recognized to the victims and their successors in title. It is therefore suggested that these ideas should be expressly reflected in Principle 34.